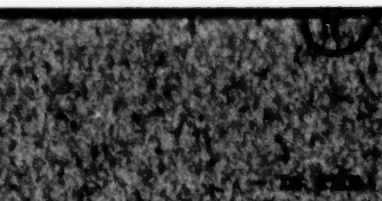

FILED
APR 28 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. [redacted] 112

DANIEL MICHAEL MacDONALD, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WILLIAM K. JACKSON,
J. HARRY COVINGTON,
Attorneys for Petitioner.

(38,397)

INDEX.

	Page
Petition for writ of certiorari to the United States Circuit Court of Appeals for the First Circuit	1
The decisions below	1
Summary of the matter involved	2
Reasons relied on for granting the writ	6
Opinion of Circuit Court of Appeals (Fifth Circuit) in *United States v. Marco Nicolich*	9
Brief for petitioner	13
Ground on which jurisdiction of this court is invoked	13
Statement of the case	14
Argument	15
I. Petitioner is unquestionably entitled to citizenship, unless the Act of May 9, 1918, changed the provisions of law theretofore applicable to petitioner in his petition	15
II. Subdivision 7 of Section 4, added by the Act of May 9, 1918, was a war-time measure, applicable only to particular classes of aliens therein designated, and did not change the law applicable to this petitioner	18
Subdivision 7 of Section 4 of the Act of June 29, 1906, as added to said section by the Act of May 9, 1918	27

Table of Cases Cited.

In re Schneider, 164 Fed., 335	16, 17
Ozawa v. United States, 260 U. S., 178, 194	23
United States v. Nicolich	6
United States v. Rocktenscheil, 208 Fed., 530	16

Statutes Cited.

Act of June 29, 1906	2, 3, 7, 15, 18, 27
Act of May 9, 1918	3, 4, 7, 18
Act of May 13, 1925	13
Revised Statutes 4131, U. S. Code, Title 46, Section 221 et seq.	25

Congressional Records Cited.

Congressional Record, April 12, 1918, p. 5080	21
April 16, 1918, p. 5146	21
May 3, 1918, p. 6002	22
May 7, 1918, p. 6012	22
May 3, 1918, p. 6027	22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 945 117

DANIEL MICHAEL MacDONALD, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Daniel Michael MacDonald, respectfully represents:

The Decisions Below.

1. On December 2, 1927, the United States Circuit Court of Appeals for the First Circuit affirmed (R.,

16) a judgment of the District Court of the United States for the District of Massachusetts (R., 5), denying petitioner's petition for naturalization, made in accordance with the Act of June 29, 1906, chapter 3592, 34 Stat., 596. Circuit Judge Anderson dissented.

2. A petition for rehearing was denied on January 12, 1928 (R., 17).

3. On April 10, 1928, Mr. Justice Holmes extended the time within which application for a writ of certiorari might be made and the record filed for a period of twenty days after April 11, 1928, to include May 1, 1928 (R., 17).

4. The opinion of the circuit court of appeals will be found in the record at page 9, and that of the district court at page 5.

Summary of the Matter Involved.

1. The question presented by this case is whether a British subject, domiciled and resident in the United States and otherwise qualified to become a citizen of the United States under the Act of June 29, 1906, is disqualified by any provision of the Act of May 9, 1918, because, during part of the five-year period preceding his petition for naturalization, he served a New Jersey corporation upon its vessels registered under the British flag, plying to and from a port of the United States and foreign countries.

2. The Act of June 29, 1906, chapter 3592, Section 4, 34 Stat., 596, 598, provided the procedure and require-

ments for naturalizing aliens in numbered subparagraphs as follows:

First. Provided for the declaration of intention to become a citizen.

Second. Provided for the petition for naturalization.

Third. Provided for an oath to support the Constitution and renounce allegiance to foreign sovereigns.

> Fourth. "It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that, immediately preceding the date of his application, he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record."

Fifth. Renunciation of orders of nobility.

Sixth. Procedure in event of death of petitioner.

3. The Act of May 9, 1918, chapter 69, 40 Stat., 542, amended Section 4 of the Act of June 29, 1906, *supra*,

by adding seven new subdivisions. These new subdivisions were to facilitate the naturalization of persons serving the United States in its armed forces or in the merchant marine, to restrict naturalization of enemy aliens and to restore citizenship to American citizens in the armed forces of nations at war with Germany. The new subdivision "Seventh" added by the Act of May 9, 1918, provided a more simplified procedure and more lenient requirements for naturalization of aliens in the armed forces of the United States, or in the merchant marine, than those provided by the Act of June 29, 1906. In the course of this subdivision occurred the following proviso (40 Stat., 544):

> "*Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry."

4. Petitioner, a British subject, was born in Big Bras d'Or, Nova Scotia, in the Dominion of Canada, on the twenty-fifth day of August, 1877. He entered the United States at the port of New York, as a passenger, September 17, 1920, on the steamship *Ebro* of the Pacific Steam Navigation Company from Callao, Peru, and paid the head tax imposed on aliens by the United States Government. He immediately established his permanent residence in the city of Boston, in the Commonwealth of Massachusetts, where he was joined by

his wife and child on September 1, 1921. Petitioner has continuously maintained a residence and resided with his wife and child in the vicinity of the city of Boston. Since his arrival in the United States, petitioner has been and still is in the service of the United Fruit Company, a corporation organized under the laws of the State of New Jersey, having its general offices in the city of Boston, as the master of one of its steamships, including at different times the steamship *Macabi*, the steamship *Maraci* and the steamship *San Benito*, all voyages commencing and ending at United States ports, principally at the port of Boston. The above-named steamships are of British registry.

5. On November 30, 1921, petitioner filed a declaration of his intention to become a citizen of the United States in the District Court of the United States for the District of Massachusetts at Boston, and thereafter duly complied with all the requirements for naturalization contained in subdivisions 1 to 4, inclusive, of the Act of Congress of June 29, 1906. Petitioner filed his petition for naturalization on December 22, 1926.

6. The district court, amongst other facts, specifically found that petitioner was in every respect eligible and qualified to become a citizen of the United States, except that during the period of his residence his employment had compelled him to sail from the port of Boston to various ports in Central America and return to the port of Boston as master of vessels registered under the laws of the Kingdom of Great Britain. The district court denied his petition for naturalization

solely on the ground that subdivision 7 of Section 4 of the Naturalization Act, as amended May 9, 1918, provided that service on vessels other than of American registry shall not be considered as residence for naturalization purposes. Petitioner contended that this proviso clause, incorporated in a new subdivision granting special rights and privileges to certain classes of aliens enumerated therein, was a limitation on those special classes only and was not a general restriction upon the rights or privileges of aliens generally, who do not come within any of the said designated privileged classes.

7. On December 2, 1927, the circuit court of appeals sustained the decision of the district court, Circuit Judge Anderson dissenting. Petitioner duly filed a petition for rehearing, which was denied on January 12, 1928. The mandate of the circuit court of appeals was stayed, pending the decision of this Court, on petitioner's application for a writ of certiorari.

Reasons Relied on for the Granting of the Writ.

1. The decision of the Circuit Court of Appeals for the First Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States v. Marco Nicolich*, decided April 4, 1928, and printed at the end of this petition (p. 9 herein).

The facts in the two cases are substantially identical. The Circuit Court of Appeals for the Fifth Circuit, referring to the decision of the Circuit Court of Appeals for the First Circuit in the present case, and certain district court cases, said:

> "We are not disposed to follow these cases and have reached a different conclusion."

A situation exists, therefore, whereby this petitioner, if a resident of New Orleans, might become a citizen of the United States, but, being a resident of Boston, is denied that right.

2. The Circuit Court of Appeals for the First Circuit has decided (in a way probably untenable) an important question of Federal law, which has not been, but should be, settled by this Court.

Few question are more important to aliens resident in the United States than the law governing their right to become citizens of the United States. It is also important to the United States that the naturalization laws applicable to alien seamen desiring to become citizens of the United States—which affects their eligibility for service on American vessels—should be settled. The petitioner contends, and the Circuit Court of Appeals for the Fifth Circuit held, that under the Act of June 29, 1906, and prior thereto, an applicant in his position was entitled to citizenship, and that the Act of May 9, 1918, did not take away his right, but merely dealt with a new and privileged class of applicants enumerated therein. The Circuit Court of Appeals for the First Circuit held to the contrary erroneously, so petitioner contends, in view of the intention of Congress and the recognized rules of statutory construction, hereafter more fully discussed.

Wherefore, the petitioner, believing that the aforesaid judgment of the United States Circuit Court of

solely on the ground that subdivision 7 of Section 4 of the Naturalization Act, as amended May 9, 1918, provided that service on vessels other than of American registry shall not be considered as residence for naturalization purposes. Petitioner contended that this proviso clause, incorporated in a new subdivision granting special rights and privileges to certain classes of aliens enumerated therein, was a limitation on those special classes only and was not a general restriction upon the rights or privileges of aliens generally, who do not come within any of the said designated privileged classes.

7. On December 2, 1927, the circuit court of appeals sustained the decision of the district court, Circuit Judge Anderson dissenting. Petitioner duly filed a petition for rehearing, which was denied on January 12, 1928. The mandate of the circuit court of appeals was stayed, pending the decision of this Court, on petitioner's application for a writ of certiorari.

Reasons Relied on for the Granting of the Writ.

1. The decision of the Circuit Court of Appeals for the First Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States v. Marco Nicolich*, decided April 4, 1928, and printed at the end of this petition (p. 9 herein).

The facts in the two cases are substantially identical. The Circuit Court of Appeals for the Fifth Circuit, referring to the decision of the Circuit Court of Appeals for the First Circuit in the present case, and certain district court cases, said:

"We are not disposed to follow these cases and have reached a different conclusion."

A situation exists, therefore, whereby this petitioner, if a resident of New Orleans, might become a citizen of the United States, but, being a resident of Boston, is denied that right.

2. The Circuit Court of Appeals for the First Circuit has decided (in a way probably untenable) an important question of Federal law, which has not been, but should be, settled by this Court.

Few question are more important to aliens resident in the United States than the law governing their right to become citizens of the United States. It is also important to the United States that the naturalization laws applicable to alien seamen desiring to become citizens of the United States—which affects their eligibility for service on American vessels—should be settled. The petitioner contends, and the Circuit Court of Appeals for the Fifth Circuit held, that under the Act of June 29, 1906, and prior thereto, an applicant in his position was entitled to citizenship, and that the Act of May 9, 1918, did not take away his right, but merely dealt with a new and privileged class of applicants enumerated therein. The Circuit Court of Appeals for the First Circuit held to the contrary erroneously, so petitioner contends, in view of the intention of Congress and the recognized rules of statutory construction, hereafter more fully discussed.

Wherefore, the petitioner, believing that the aforesaid judgment of the United States Circuit Court of

Appeals for the First Circuit is erroneous, respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the First Circuit, as provided by law, to the end that the said cause may be reviewed and determined, and that upon final consideration thereof the judgment of the said United States Circuit Court of Appeals for the First Circuit may be reversed, with such directions as to this Court may seem proper and in conformity with law.

Respectfully submitted,

WILLIAM K. JACKSON,
J. HARRY COVINGTON,
Attorneys for Petitioner.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

No. 5109.

UNITED STATES OF AMERICA, *Appellant*,

v.

MARCO NICOLICH, *Appellee*.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Wayne G. Borah, U. S. Attorney; Edmond E. Talbot, Asst. U. S. Attorney, for Appellant.

Walker B. Spencer, Hugh S. Suthon (Spencer, Gidiere, Phelps & Dunbar on the brief), for Appellee.

Before WALKER, BRYAN, and FOSTER, Circuit Judges.

FOSTER, *Circuit Judge:*

It appears that appellee, a native of Austria, arrived in New Orleans August 6, 1914, and was duly admitted as an immigrant. He established a residence in that city and has continuously maintained it, residing there with his wife when at home, and his domicile in New Orleans has never been abandoned. After coming to New Orleans, he was employed as master of ships of foreign registry, owned by American citizens, and has made regular trips to foreign ports from New Orleans, always returning to his wife and home at the end of each trip. He filed his declaration of intention to become a citizen on April 18, 1923, and his petition for naturalization, under the provisions of Sec. 4 of the Act of June 29, 1906, on October 27, 1925, accompanying his petition with the certificate of arrival required

by that act. His application for citizenship came up for a hearing on March 4, 1927, and was opposed by the Bureau of Naturalization, on the ground that his residence in the United States could not be continuous for five years because of the provisions of subdivision 7, added to Sec. 4 of the Act of June 29, 1906, by the Act of May 9, 1918, which reads as follows:

> "*Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry."

The district court overruled this objection for reasons expressed in a well-considered opinion (17 Fed. (2d), 611), and admitted appellee to citizenship.

It is concened by appellant that, but for the provisions of the Act of 1918, above set out, appellee would be entitled to be naturalized, but it is contended that the said statute is an insuperable bar as long as his service on foreign vessels continues. In support of this contention, the following cases, which are undoubtedly in point, are relied upon. MacDonald *v.* U. S., 22 F. (2d), 747; *In re* Willis, 169 N. Y. S., 261; Pet. of MacKinnon, 21 F. (2d), 445. We are not disposed to follow these cases and have reached a different conclusion.

Before the Act of June 29, 1906, aliens seeking naturalization were required to file a declaration of intention at least two years prior to admission and to show five years continuous residence in the United States and one year at least within the jurisdiction of the court (R. S., 2165). An exception was made in favor

of seamen permitting them to be naturalized after serving three years on board a merchant vessel of the United States subsequent to a declaration of intention (R. S., 2174). In these respects the Act of June 29, 1906, made no change in the law.

Prior to the adoption of the Act of 1918, it was universally held by the courts that residence, within the meaning of the naturalization laws, was synonymous with domicile, and an alien once acquiring a domicile within the United States, in good faith, with the intention of becoming a citizen, did not lose it by temporary absence in pursuit of his business or vocation as a sailor, or by short visits to his native country purely for pleasure, provided he always intended to return to his domicile. Of course, a decision as to the acquisition and retention of domicile depends in each case upon the facts presented.

The Act of 1918 was adopted at the height of the World War, without the opportunity for careful consideration usually given to statutes of that character. It was intended to facilitate naturalization rather than to restrict it. The United States was in pressing need of American citizens as watch officers for the merchant fleet that was being rapidly acquired. By subdivision 7, added to the existing law by that act, sailors on American vessels were allowed to file a declaration of intention after three years' service and to be naturalized immediately, and other classes of persons were given privileges of naturalization they had not theretofore enjoyed.

A proviso should be narrowly construed and confined to the context of the act in which it appears, and it will not be given an effect repugnant to the clearly expressed intention of Congress (Dollar Savings Bank *v.* U. S., 19 Wall., 227). The proviso above set out was merely declaratory of the existing law and was evi-

dently inserted out of an abundance of caution. To give it the effect contended for, we would have to assume that it was intended to be retroactive and to deprive seamen of the benefits of the naturalization laws they have always enjoyed and which are still enjoyed by all other persons, quite contrary to the usual attitude of Congress.

We conclude that a seaman who has been duly admitted to the United States as an immigrant, and has in good faith established a domicile, is entitled to be naturalized after showing five years continuous residence and otherwise complying with the law. He does not come within the class of persons covered by the proviso and it is not a bar to his acquiring citizenship.

The judgment appealed from is

Affirmed.

(Original filed April 4, 1928.)